Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-140

REITHOFFER'S INC., *Appellant*

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Appellee*

On Appeal from the ~~Supreme~~ Circuit Court of Virginia, Fairfax County

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

This appeal involves two separate ordinances of Fairfax County, Virginia (Appendices A and B) which purport to regulate and tax carnivals such as those operated by Appellant. The opinion of the trial court, the Circuit Court of Fairfax County, Virginia, as rendered at the hearing of this cause on July 25, 1974, is unreported, and is printed herein as Appen-

dix C. The Final Order of the trial court, entered October 9, 1974, is printed herein as Appendix D. The Supreme Court of Virginia rejected Appellant's Petition for Appeal on February 26, 1975, Appendix E, and denied Appellant's Petition for Rehearing on April 28, 1975, Appendix F.

JURISDICTION

1. This proceeding is an appeal from a decree rendered by the highest court of a State, the Supreme Court of Virginia, which decree upheld the validity of two ordinances of the County of Fairfax, Virginia. The subject ordinances had been alleged by appellant herein in its bill for declaratory relief to be repugnant to the Constitution of the United States, Amendment XIV, and Article I, Section 8 of the Constitution of the United States.

2. On February 26, 1975, the Supreme Court of Virginia rejected Appellant's Petition for Appeal, affirming the ruling of the Circuit Court of Fairfax County, Virginia, and Rehearing was denied on April 28, 1975.

3. Notice of appeal to the Supreme Court of the United States was filed July 23, 1975, in the Circuit Court of Fairfax County, Virginia.

4. Jurisdiction of this appeal is conferred upon the Supreme Court of the United States by 28 U.S.C.A. § 1257(2).

5. The following cases sustain the jurisdiction of this Court: *Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969); *Metlakatla Indian Community, Annette Island Reserve* v. *Egan,* 363 U.S. 555 (1960); *Winters* v. *People of State of N.Y.,* 333 U.S. 507 (1948); *Jamison* v. *State of Texas,*

318 U.S. 413 (1943); *King Mfg. Co.* v. *City Council of Augusta,* 277 U.S. 100 (1928); *North Carolina R. Co.* v. *Zachary,* 232 U.S. 248 (1914). Timeliness, petition for rehearing, *Citizens Bank* v. *Opperman,* 249 U.S. 448 (1919).

6. The validity of the statutes of a state is involved, namely Section 30-7.2.6.1.4 and Section 7.3 of the Code of the County of Fairfax (1961), as amended, which are ordinances of a political subdivision of the State of Virginia, printed herein as appendices A and B respectively.

STATEMENT OF THE CASE

This cause originated on February 14, 1974 when Appellant, Reithoffer's Inc., filed a bill of complaint, praying that the Circuit Court of Fairfax County, Virginia declare Section 30-7.2.6.1.4 of the Code of the County of Fairfax (1961), as amended (Appendix A) unconstitutional.

In the bill of complaint, Appellant alleged that it was then, and had been for many years, duly and lawfully engaged in the business of operating carnivals, and had appeared among other locations, in Fairfax County, Virginia. Appellant further alleged that said ordinance: (a) provided for a taking of its property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution (b) constitutes a restraint of trade in violation of Article I, Section 8 of the United States Constitution, (c) violates the equal protection clause of the said Fourteenth Amendment, and (d) exceeds the limits of the police power of the county, thereby denying due process of law, these federal questions being raised in Paragraph 7, subparagraphs a through f, inclusive.

An amended complaint was filed on June 7, 1974, in which Appellant further alleged that Section 7.3 of said Code (Appendix B) is unconstitutional in that: (a) it constitutes a taking of its property without due process of law in contravention of the said Fourteenth Amendment, (b) it violates the equal protection clause of said Fourteenth Amendment, (c) it violates, in effect, the said Article I, Section 8, and (d) that it exceeds the lawful limits of the police power of the County, thereby depriving Appellant of due process of law, these federal questions being raised in Count II, Paragraph 4 of Appellant's amended complaint.

This cause was heard on the merits on July 25, 1974, and the trial court held invalid the portion of the former ordinance (Appendix A) which required the sale of all tickets and collection of all monies by bona fide members of the sponsoring organization, but upheld the other provisions of the subject ordinances. (Appendices C and D).

Reithoffer's Inc. duly excepted to the rulings of the trial court, insofar as the validity of the subject ordinances was upheld, raised the federal questions herein presented by assignment of error, and duly filed a petition for appeal with the Supreme Court of Virginia.

On February 26, 1975, Appellant's petition for appeal was denied and on April 28, 1975, Appellant's petition for rehearing was denied.

On February 28, 1975, the record was returned to the trial court, the Circuit Court of Fairfax County, in which court Notice of Appeal to the Supreme Court of the United States was duly filed on July 23, 1975.

THE QUESTIONS ARE SUBSTANTIAL

1. The Statutory Requirement of Sponsorship Has No Valid Public Purpose and the Means of Purported Regulation Are Unduly Oppressive.

Section 30-7.2.6.1.4 (Appendix A) requires a carnival operator to obtain the sponsorship of one of a group of eligible sponsoring organizations in order to appear in any location other than an industrial zone. Yet at the trial of this cause, the only public benefit which county officials related to this sponsorship was revenue generated for the sponsor by its sponsorship fee exacted from the carnival.

This ordinance, which is found among the zoning ordinances of the county, was described as a regulatory or police measure by the Appellee both in discovery and in the testimony of its officials at trial. As an exercise of the police power, the following test must be met to sustain validity:

"To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not duly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations;"

Lawton v. *Steele,* 152 U.S. 133 (1894);
Burns Baking Co. v. *Bryan,* 264 U.S. 504 (1924)
Liggett Co. v. *Baldridge,* 278 U.S. 105 (1928)
Goldblatt v. *Town of Hempstead, New York,* 369 U.S. 590 (1962).

Appellant does not question the power of a state or locality to promulgate and enforce regulations upon the carnival industry which have a valid public purpose, such as site or ride inspection, and approval of location with respect to noise, traffic flow or sanitary provisions.

The sponsorship provision of the subject ordinance however, provides no such regulation for the benefit of the general public. This provision further imposes, upon the lawful business of operating carnivals, unnecessary restrictions which are oppressive to the carnival industry, inasmuch as the carnival operator, in addition to the usual tasks of obtaining an acceptable land area and complying with local licensing provisions, must attempt to find an organization from among the eligible group which is willing to act as sponsor. Many of those eligible organizations have no telephone or address made available to the public, and the task of obtaining a sponsor may be achieved only by local knowledge of the various organizations and their members.

This burden upon the carnival industry is further increased by the establishment of a monopoly of carnival sponsorship in a group of local organizations. The foremost purpose of an eligible organization's sponsorship of a carnival is fund-raising. The sponsor seeks to obtain funds for its charitable, and admittedly often worthy, projects by exacting a fee from the carnival. The requirement that a sponsor be obtained greatly enhances the bargaining position of the eligible sponsors, and in effect, compels a sizable donation of the carnival's gross receipts to a local organization, the amount of which donation is not limited by the ordinance.

If the burden of sponsorship so imposed upon carnivals be lawful, any other lawful business may be hereafter compelled to do business only under the auspices of some favored organization, and to pay an unlimited portion of its receipts to that organization in return for the required sponsorship. This imposition upon lawful businesses clearly exceeds the limit of the police power and is inimical to the concepts of liberty as are insured by the Fourteenth Amendment.

> "The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."
>
> *Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897);
>
> *Adams* v. *Tanner,* 244 U.S. 590 (1917).

As the Court observed in *Adams* v. *Tanner, supra:*

> "Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and

whenever some ostensible justification is advanced and the police power invoked."

The requirement of sponsorship as a condition to transacting a lawful business serves no legitimate public purpose and unduly infringes constitutionally guaranteed liberties, and therefore, is an invalid exercise of the police power.

2. The Required Sponsorship May Be Arbitrarily or Capriciously Denied to Qualified Carnival Operators.

Section 30-7.2.6.1.4 (Appendix A) requires that, as a condition to obtaining a special use permit, a carnival obtain the sponsorship of one of a group of eligible sponsoring organizations as defined therein. There is no provision in this Section, or in any other section of the Fairfax County Code, that any qualified carnival be furnished sponsorship by an eligible organization. There is no provision for alternative means of obtaining a special use permit in the event that no sponsor is found, and further, there is no provision for hearing or appeal in the event none of the eligible organizations will act as sponsor.

Thus, the subject ordinance is facially unconstitutional in that it contains no "must" or "shall" provisions with respect to acceptance of sponsorship by any eligible organization, nor any guidelines as to the manner in which these organizations shall accept or refuse sponsorship. The Appellee has delegated its legislative function to a diverse group of non-governmental organizations, allowing them to determine at their sole discretion which carnivals may operate in the county and which ones may not.

The denial of fundamental liberties which results from this unlawful delegation of legislative power is

succinctly stated in *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886):

> "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Where any organization or group of organizations, other than the duly elected legislative body, is given the unfettered prerogative of summarily denying one the right to transact his lawful business, with no appeal from such a summary disposition of rights being afforded, a mockery is made of the principle of due process of law.

> 'The rule has become fixed that the legislature may not delegate legislative functions to private persons." 16 Am Jur 2d, Constitutional Law § 249.

Such a delegation of legislative discretion to private persons was struck down as unconstitutional in *Eubank* v. *Richmond,* 226 U.S. 137 (1912); *State of Washington* v. *Roberge,* 278 U.S. 116 (1928); *Niemotko* v. *State of Maryland,* 340 U.S. 268 (1951).

In *State of Washington* v. *Roberge, supra,* wherein an ordinance was held unconstitutional which purported to grant the authority to prevent certain uses of land to surrounding landowners, the Court found:

> "There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their

> will or caprice . . . The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."

In applying the appropriate constitutional test of what may be done under the subject ordinance, as the Court did in *Eubank, supra,* it is evident that due process of law is denied to carnival operators such as Appellant, inasmuch as their right to engage in lawful business may be arbitrarily and summarily denied by private persons.

3. The Eligible Sponsoring Organizations Are Empowered To Take Property of Carnival Operators Without Due Process of Law.

Section 30-7.2.6.1.4 (Appendix A) requires a carnival operator to secure sponsorship as a condition to obtaining a special use permit, but fails to establish any limitation upon the fee which the sponsor may exact from the carnival for its sponsorship services.

In so providing, the subject ordinance, in substance and effect, establishes a license tax in addition to that paid by the carnival to cover the administrative expense of obtaining its permit. This additional license tax is levied and collected by the sponsor without limitation, hearing, or any guaranty of uniformity whatever.

One needs only to examine the identity of the proponents of the various enactments leading to the present configuration of the subject ordinance (without exception, members of the sponsoring organizations favored by the legislation) to realize that the genuine purpose of said ordinance is to insure a method of fund-raising for local charities. There was no concern expressed by any citizen of any harmful acts requiring control of carnivals for the public good, but rather

there was "skillful agitation" by local charities for such sponsorship provisions.

Thus, the fee exacted from the carnival by the sponsoring organization for its required sponsorship in effect is just as much a tax authorized by the county as if the fee were levied and collected by the county and then paid to the sponsor. In looking at either face of the coin, it is the police power of the state which provides the compulsion to pay.

However, under the subject ordinance, the county has delegated its taxing power to private individuals and thereby has run afoul of the constitutional prohibitions of such delegation set forth in paragraph 2 hereinabove. In effect the county has required carnivals to pay a license tax to private persons and empowered those persons to exact, for their own benefit (and hopefully the benefit of some citizens of the county served by the organizations), whatever rate of tax the market will bear.

With respect to the beneficial use of the funds so exacted from a carnival, however, there is no provision that these funds be applied to any charitable or public use, but rather the funds may be used solely for the benefit of the members of the sponsoring organization. It is firmly established that neither the police power nor the taxing power may be validly exercised by the state for purposes other than those which benefit the general public welfare, or for a constitutionally valid public purpose. *Spencer* v. *Merchant,* 125 U.S. 345 (1888); *Green* v. *Frazier,* 253 U.S. 233 (1920); *Jones* v. *Portland,* 245 U.S. 217 (1917). This ordinance is patently unconstitutional in that the taxing power is delegated to private persons with no guidelines or directives for public use of the funds derived therefrom.

The subject ordinance is further facially unconstitutional in that the amount of the fee charged pursuant to the compulsory sponsorship is established by private persons rather than a legislative body, without any guidelines or provisions even attempting to curtail inequality of the tax so enacted, and without any procedure being established for hearing of any carnival operator aggrieved by such a tax. Such a taking of property without due process of law is prohibited by the Fourteenth Amendment.

4. The Burden Imposed upon Interstate Commerce Is Excessive with Relation to Putative Local Benefits.

Section 30-7.2.6.1.4 (Appendix A) establishes certain eligible sponsoring organizations with whom a carnival must deal if it wishes to obtain a temporary special use permit, and thereby establishes a monopoly of carnival sponsorship in a certain group of organizations. As the evidence produced at trial clearly showed, Appellant operates its business from state to state and relies upon freedom of movement in interstate commerce for its livelihood.

When the interference imposed by a local ordinance constitutes an undue burden upon interstate commerce or fetters interstate commerce within the borders of the locality by the imposition of unnecessary conditions or regulations, having no relation to the public safety or order, that ordinance must be declared invalid. *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570 (1925).

The power to regulate interstate commerce, in which Appellant is engaged, delegated by the several States to the Congress of the United States by Article I, Section 8 of the Constitution of the United States, is su-

preme and not subject to interference by state or local governing bodies. As stated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree."

In *Toomer* v. *Witsell*, 334 U.S. 385 (1948), the Court, in holding the statute there in question to be an undue burden, and hence invalid, stated:

> ". . . the importance of having commerce between the forty-eight states flow unimpeded by local barriers persuades us that State restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax .... The statute, in seeking to divert employment and business to South Carolina imposes an artificial rigidity on the economic pattern of the industry."

In the present case, the burdens imposed upon interstate carnival operations may well include the following: (1) the carnival must, in addition to the normal procedure of finding a location, and dealing with the property owner and local licensing officials, secure a sponsor from a group of eligible organizations. It is a time-consuming process, requiring "contacts" and "connections" to determine which individual member of such an organization, having no listed phone or central office, should be approached concerning sponsorship, and a carnival not already having a continuing

sponsor of annual events may be effectively precluded from operation, particularly on short notice; (2) the carnival, even after time-consuming effort, may be unable to locate a sponsor who needs an additional money-raising project or has the time to devote to such a project and may therefore be deprived of the right to do business in the County; and (3) even if a carnival can find a sponsor, it must pay an unlimited sum, determined by negotiations with the sponsor.

In relation to the putative local benefits, these burdens upon interstate commerce are clearly excessive, designed only to enrich the local charities at the expense of the carnival industry.

5. The License Tax Imposed Is Prohibitory of Lawful Business and an Invalid Exercise of the Police Power.

Section 7.3 (Appendix B) imposes a license fee of $200.00 per day or $1,000.00 per week upon a carnival operating in an industrial zone (an unfavorable location, but the only place an unsponsored carnival may appear) without a sponsor, and imposes a tax of $10.00 per day or $25.00 per week upon the same carnival if sponsored. With respect to the amount of regulatory license fees it is generally agreed that the fee should be reasonably commensurate with the administrative expense of regulation. 51 Am Jur 2d, Licenses and Permits § 40; *Atlantic & P. Tel. Co.* v. *Philadelphia,* 190 U.S. 160 (1903); *Ziedman & Pollie Corp* v. *Ashland,* 50 S.W.2d 557 (Ky. 1932); *Robinson* v. *Norfolk,* 108 Va. 14, 60 S.E. 762 (1908).

In the present case, the trial court found as a matter of fact from the evidence produced at trial:

> "If you were to consider the $1,000.00 weekly fee, or $200.00 per day fee, as a regulatory tax, I don't feel that the evidence has been sufficient to anywhere come close to showing the relationship of the amount of the tax to the cost of enforcement."

Indeed no evidence was produced which might even suggest any significant basis for differentiation of treatment of sponsored and unsponsored carnivals with respect to either expense of regulation, or harmful effects requiring protection of the public.

In determining whether the subject enactment is a police measure or a revenue measure, one must look beyond the label attached to the ordinance by the Appellee to the substance and effect of the ordinance. The testimony of the zoning administrator at trial was that no revenue had been generated by the subject ordinance since its inception inasmuch as no carnival had appeared in an industrial zone. The clear effect of the enactment is to compel a carnival to seek sponsorship by the levy of an inordinate license fee which effectively prohibits independent operation. Moreover, according to the evidence, an industrial zone is an unsuitable location for carnival operation.

The finding of fact above-stated is compelled by the record, and the license tax is therefore an attempted exercise of the police power which must be held invalid.

6. Even If Construed as a Revenue Measure, the License Tax Is an Invalid Enactment, Denying Equal Protection of Law to Carnival Operators.

Section 7.3 (Appendix B), as stated hereinabove, is, in effect, a regulatory enactment rather than a revenue measure. If, however, the enactment were construed as a revenue measure, it must survive the constitutional test of equal protection to be held valid, which test:

> "requires that classification rest on real and not feigned differences, that the distinction have some

relevance to the purpose of which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

Walters v. *City of St. Louis, Mo.*, 347 U.S. 231 (1954).

"The rule often has been made to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' "

Allied Stores of Ohio Inc. v. *Bowers*, 358 U.S. 522 (1959).

In attempting to rationalize the subject ordinance to conform with this rule, it is apparent that the only object of the legislation which will bear relation to the classification is the compulsion of sponsorship. Appellant's carnival may appear at a certain time and place, and transact a certain type of business with a sponsor and have the favored classification, whereas if the same carnival appears at the same time and place and transacts precisely the same business, without a sponsor, it is subjected to payment of a forty-fold greater tax. This ordinance must be therefore held invalid as a denial of equal protection unless the purpose of the ordinance is to compel sponsorship.

Thus the investigation of the validity of the subject ordinance leads full circle to the inescapable conclusion as to its purpose. That purpose is to compel the carnival owner to obtain a sponsor and to share his gross receipts with private persons, which persons are not required to apply the proceeds so derived to any public purpose, and the license tax ordinance is therefore invalid inasmuch as no public purpose is served thereby.

CONCLUSION

Appellant accepts the fact that many public benefits are derived from the efforts of groups such as those eligible sponsoring organizations set apart by the subject ordinances. However, accepting this premise does not override the fundamental requirement of due process of law and cause it to yield to the dogma that "the end justifies the means." The ultimate question with respect to each of the subject ordinances is: may legitimate businesses be required to transact their business only under the auspices of some favored organization?

The members of these benevolent organizations are able to use their worthy causes and their status as constituents of the local legislators to persuade these lawmakers to effectively grant them the power to demand a share of a lawful business in such a measure as the selected organizations may determine, or deny the right of that business to operate altogether. This may be done under the subject legislation without any investment or business risk whatever on the part of the selected organizations.

The carnival, as one of the lawful businesses affected under the subject ordinance, is perhaps the easiest prey, particularly when it engages in interstate commerce and its operators are not constituents of the legislators. However, if the door is opened and allowed to remain ajar, why not extend this practice to other lawful businesses, should the benevolent organizations require more receipts for their worthy causes and good ends, as their purposes may grow, or after they have driven the businesses covered by this ordinance from the ranks of business operations as a result of their unlimited demands which under the ordinance they are licensed to impose. The trial court in

this case was courageous enough to strike down a portion of the subject ordinance as not serving any public purpose, thereby recognizing an unlawful encroachment by this local legislature on the private business sector. It is submitted that the same compelling rationale exists for holding void the other sections of the ordinance which are the subject of this appeal.

This creation of laws for the benefit of local organizations to the detriment of carnival operators is not confined to one jurisdiction but has spread to many parts of the land, and faces carnival operators at many points in their travels in interstate commerce. Prince George's County, Maryland and the Town of Hempstead, New York are two jurisdictions which, during the past two weeks, have ruled upon similar issues affecting carnival operation.

The ordinance at issue in the former jurisdiction, like that at issue in the present case, required (or was administered as though it required) sponsorship of a carnival by one of a group of local eligible organizations. The Circuit Court of Prince George's County, Maryland entered an Order on July 18, 1975, declaring that such requirement of sponsorship "is and shall be invalid and of no force and effect." Appendix I.

In the latter jurisdiction a District Court held that carnival operation is a lawful business which may not be arbitrarily forbidden under the guise of protecting the public. Appendix H. In that case, the subject ordinance purported to prohibit amusement rides unless located in a particular coliseum.

It may well be that carnivals and charitable organizations will freely contract for their mutual benefit in the future without governmental interference. However, the legislative imposition of the particular restrictions of the subject ordinances, ignoring due process of law and other constitutional guarantees of liberty zealously guarded by this Court, creates a potential stranglehold held by the favored organizations upon the carnival industry.

Such an interference with free enterprise is unwarranted, and the implications of this increasingly prevalent "regulation by sponsorship" are far-reaching. Absent a timely decision upon the validity of such "regulation" by this Court, it is submitted that the trend will be broadened to encompass other lawful businesses.

The questions presented are therefore substantial, both with respect to the carnival industry and other lawful businesses, having great significance to the development of the laws of the land, and are timely for plenary consideration by this Court.

Respectfully submitted,

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Certificate of Service

I, the undersigned member of the bar of the Supreme Court of the United States, hereby certify that three copies of this Jurisdictional Statement have been mailed, first class, postage prepaid, addressed to William Dana Shapiro, Esquire, Assistant County Attorney, Counsel for Appellee, 4100 Chain Bridge Road, Fairfax, Virginia 22030, this 25th day of July, 1975.

B. G. Stephenson

B. G. STEPHENSON

APPENDIX

APPENDIX A

Code of the County of Fairfax (1961), as amended, Section 30-7.2.6.1.4

CARNIVAL, CIRCUS, FESTIVAL, FAIR, HORSE SHOW, THE SALE OF CHRISTMAS TREES OR OTHER SEASONAL COMMODITIES AND OTHER SIMILAR ACTIVITIES.

The Activity shall be subject to the provisions of a temporary special permit issued by the zoning administrator, which permit shall specify such conditions as to locations, parking, traffic access, and safety requirements as will protect the health, safety and welfare of the public and which will protect adjoining property from any adverse effects of the activity.

a) Specific Requirements. No temporary special permit shall be issued by the zoning administrator for any activity within this subsection except upon the following conditions:

   1) Any activity within this subsection shall be sponsored by a volunteer fire company, local chamber of commerce, veterans' organization, service club, civic organization, church or religious organization, sports or hunt club, charitable, educational or non-profit organization or recognized chapter thereof whose principal administrative offices are located within the County of Fairfax.

   2) Bona fide members of the sponsoring organization shall collect all monies and handle all sales of tickets for admission, rides, shows, games, etc. and shall have custody of all monies collected until appropriate settlement is made with the owner of the activity. A bona fide member of a sponsoring organization shall be a person whose permanent residence lies within the boundaries of the Northern Virginia Regional Planning District Commission.

3) The sponsoring organization shall submit with its application for a temporary special permit a list of the names and addresses of those members of the sponsoring organization who will handle and collect all monies at the activity.

4) Where the activity is a circus, fair, or carnival, and the owner of the circus, fair or carnival is an entity other than the sponsoring organization, the sponsoring organization shall furnish the zoning administrator the name and address of the owner or owners of the circus, fair or carnival. The zoning administrator shall determine from previous performance and other information, that the owner or owners are of good repute.

5) The sponsoring organization shall furnish the County Health Director information as to sanitary arrangements and facilities to be used by the public and employees, and the County Health Director shall advise the zoning administrator that such arrangements and facilities will be adequate if properly used and maintained.

6) The zoning administrator shall not issue a temporary special permit for any activity under this subsection where activity will occur within one mile of, and at the same or partially the same time, as any other activity for which a temporary special permit has been obtained under this subsection.

APPENDIX B

Code of the County of Fairfax (1961), as amended, Section 7.3

"The County license tax on carnivals shall be two hundred dollars per day or one thousand dollars per week. For the purpose of this section, a carnival shall be taken to mean an aggregation of shows, amusements, concessions, eating places and riding devices or any of them, operated together on one parcel of ground or street or on contiguous parcels of ground or streets, moving from place to place, whether the same are owned and actually operated by separate persons or not.

For carnivals operating under a special use permit as provided for in section 30-137, the county license tax shall be ten dollars per day or twenty-five dollars per week."

APPENDIX C

1 **Partial Transcript**

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Chancery No. 41834

REITHOFFER'S, INCORPORATED, *Complainant,*

v.

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Defendant.*

Fairfax, Virginia
Thursday, July 25th, 1974

The trial commenced at 10:00 o'clock a.m.

BEFORE:

THE HONORABLE BARNARD F. JENNINGS, Judge

APPEARANCES:

B. G. STEPHENSON, Esq., and GEORGE H. BALTHROP, Esq., 2001 Jefferson Davis Highway, Suite 603, Arlington, Virginia, 22202, counsel for the complainant.

WILLIAM DANA SHAPIRO, Esq., Assistant County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia, 22030, counsel for the defendant.

3 PROCEEDINGS

* * * * * * * * * *

THE COURT: In commenting on your argument and pleadings I am not going to try to take each part of the memorandum and comment on it or give you my reasons for the decision that I am reaching as to each aspect of it but only as to a part of it that I feel warrants some special comment.

First of all, as you know, we have the proposition of law that an ordinance is presumed to be constitutional for practical purposes. There's a presumption of support of the validity of any ordinance and the burden is upon who attacks the validity of the ordinance to prove that it has not been properly adopted or there is not a proper basis for it and for the large part I do not feel that the burden has been borne by the petitioner, by the complainant, in this case and I do feel that it is the proper exercise of the police power with one qualification, one illumination and that is that portion of the ordinance which requires that a member of the sponsoring organization—bona fide member of the sponsoring organization collect the money or handle the ticket sales and that relating part of the ordinance.

I just cannot see how that is related to the police
4 power, how it is related to the health, safety or morals or welfare of the affected portion of the populace and I do not feel that that is a valid portion of the ordinance and I would grant the petitioner's request as far as that aspect of that particular ordinance is concerned. The other respects I do feel, as I said, it is a proper exercise of the police power.

* * * * * * * * * *

If you were to consider the $1,000 weekly fee, or $200 per day weekly fee, as a regulatory tax, I don't feel that the evidence has been sufficient to anywhere come close to showing the relationship of the amount of the tax to the cost of the enforcement, but since there is no evidence that it is anything other than a revenue producing measure, it is a simple decision. I do feel that it is a valid and proper tax under the circumstances, so, if the counsel for the Board of Supervisors will prepare an appropriate order, taking exceptions, and counsel for the complainant sign it, I will sign it.

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Chancery No. 41834

REITHOFFER'S, INC., *Complainant,*

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Defendant.*

Final Order

THIS CAUSE came to be heard on the 25th day of July, 1974, upon the pleadings formerly read, upon testimony heard *ore tenus,* stipulations of law and fact, exhibits, memoranda, and upon argument of counsel.

AND IT APPEARING to the Court that Section 7.3 of the Code of the County of Fairfax (1961), as amended, is a legal, c nstitutional and valid ordinance.

AND IT FURTHER APPEARING to the Court that the requirement of Section 30-7.2.6.1.4 of the Code of the County of Fairfax (1961), as amended, that a bona fide member of a sponsoring organization collect the money or handle the ticket sales of a sponsored organization bears no substantial relation to the public health, safety, morals or welfare and is, therefore, an improper exercise of the police power.

AND IT FURTHER APPEARING to the Court that all of the remaining provisions of Section 30-7.2.6.1.4 of the Code of the County of Fairfax (1961), as amended, are legal, constitutional and a proper exercise of the police power. Now, therefore, it is

ADJUDGED, ORDERED and DECREED that the portion of Section 30-7.2.6.1.4 of the Code of the County of Fairfax (1961), as amended, requiring that a bona fide member of

a sponsoring organization collect the money or handle the ticket sales of a sponsored organization be, and the same hereby is, declared to be, void and without force of law and

IT IS FURTHER ADJUDGED, ORDERED and DECREED that all of the other provisions of Section 30-7.2.6.1.4 and all the provisions of Section 7.3 of the Code of the County of Fairfax (1961), as amended, shall continue and remain in full force and effect.

AND THIS ORDER IS FINAL.

/s/ BARNARD F. JENNINGS
Barnard F. Jennings
Circuit Judge

SEEN AND EXCEPTED TO:

/s/ B. G. STEPHENSON
B. G. Stephenson
Counsel for Complainant
2001 Jefferson Davis Highway
Suite 603
Arlington, Virginia 22202

/s/ WILLIAM DANA SHAPIRO
William Dana Shapiro
Assistant County Attorney
Counsel for Defendant
4100 Chain Bridge Road
Fairfax, Virginia 22030

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 26th *day of* February, 1975.

The petition of Reithoffer's Inc. for an appeal from a decree entered by the Circuit Court of Fairfax County on the 9th day of October, 1974, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Board of Supervisors of Fairfax County was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

A Copy,

Teste:

HOWARD G. TURNER, *Clerk*

By: ALLEN L. LUCY
Deputy Clerk

APPENDIX F

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 28th *day of* April, 1975.

Reithoffer's Inc., Appellant,

against Record No. 741155

Board of Supervisors of Fairfax County, Appellee.

Upon a Petition for Rehearing

On mature consideration of the petition of the appellant to set aside the decree entered herein on the 26th day of February, 1975, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

ILLEGIBLE
Clerk

APPENDIX G

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

REITHOFFER'S INC. *Appellant,*

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA
Appellee.

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that Reithoffer's Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme Court of Virginia, denying the petition for Rehearing filed by Appellant, insofar as said decree affirmed the validity of the subject ordinances herein attacked by appellant as being unconstitutional, said final decree entered in this chancery cause on April 28, 1975.

This appeal is taken pursuant to U.S.C.A. § 1257(2).

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The complete record of the proceedings in the Circuit Court of Fairfax County formerly transmitted to the Clerk of the Supreme Court of Virginia.

2. All Orders or Decrees entered by the Supreme Court of Virginia.

III. The following questions are presented by this appeal:

1. Is the statutory requirement, that a carnival be sponsored by a designated benevolent organization in order to obtain a permit to operate its business, an invalid exercise of the police power of the State, serving no valid public purpose and, depriving carnival operators of liberty, or property, without due process of law?

2. Does the said statutory requirement of sponsorship, which provides no requirement that any qualified carnival be furnished sponsorship, and fails to provide procedure for any appeal of arbitrary refusal of sponsorship, deprive carnival operators of liberty or property without due process of law?

3. Does the said statutory requirement of sponsorship, which provides no limitation of the fee which is exacted by the sponsor from the carnival for its required sponsorship, deprive carnival operators of liberty or property without due process of law?

4. Does the said statutory requirement of sponsorship, having no provision for sponsorship of any qualified carnival, nor any limitation upon the fee exacted by the required sponsor, constitute an unlawful local interference with interstate commerce?

5. Is the tax imposed upon a carnival which chooses to operate in an industrial zone without a sponsor, at the rate of $200.00 per day or $1,000.00 per week, as opposed to a tax of $10.00 per day or $25.00 per week upon the same carnival if sponsored, a confiscatory tax which is in substance and effect a regulatory enactment rather than a revenue measure, and an invalid exercise of the police power, depriving carnival operators of liberty, or property, without due process of law?

6. Is the said tax an invalid revenue measure, based upon an arbitrary classification of sponsored and unsponsored carnivals, thereby denying equal protection of the law to carnival operators?

REITHOFFER'S INC.

By: /s/ B. G. STEPHSON
Of Counsel

B. G. STEPHENSON, LTD.

By: /s/
B. G. Stephenson
Counsel for Appellant
2001 Jefferson Davis Hwy.
Arlington, Virginia 22202

CERTIFICATE OF SERVICE omitted

• • • • • • • • • •

APPENDIX H

STATE OF NEW YORK: NASSAU COUNTY
SECOND DISTRICT COURT: HEMPSTEAD PART

PEOPLE OF THE STATE OF NEW YORK, *Plaintiff*,

-against-

SOUTH SHORE AMUSEMENTS, INC., *Defendant*.
Hempstead, N. Y.

Before: HON. I. STANLEY ROSENTHAL
District Court Judge

Decision

Appearances:

W. KENNETH CHAVE, JR., ESQ.
Town Attorney, Town of Hempstead
Hempstead Town Hall
Main Street
Hempstead, New York 11550

By: ARTHUR J. NASTRE, ESQ.
Assistant Town Attorney

LEOPOLD KAPLAN, ESQ.
Attorney for Defendant
19 West 44th Street
Suite 611
New York, New York 10036

The defendant is charged in eight separate informations with violating Town of Hempstead Ordinance Section 105-3, subdivision D, in that it operated certain mechanical rides in violation of that section.

Chapter 105 of the Town of Hempstead Ordinances, as stated in Section 105-1, was reenacted to "protect the residents of the Town of Hempstead and the public at large from nuisances and hazards which result from the *unregu-*

lated (emphasis ours) operation of bazaars, carnivals, circuses, fairs and other amusements of a similar type." The Chapter provides licensing procedures for any "special event", which is defined as "Any bazaar, carnival, circus, fair, freak show, pony track, rodeo or other amusement of like kind and nature."

In addition to barring special events unless a license is first obtained, Section 105-3 subd. D states: "Amusement rides are prohibited". Amusement rides are defined in Section 105-2 as "Any kind of machine, apparatus or device which is designed or used to propel, project or move a person through the air, along the ground or otherwise, and shall include a carousel, Ferris wheel, gravity steeplechase, scenic railway, parachute jump and other similar machinery customarily associated with amusements or carnivals."

It is interesting to also examine Section 105-3 subd. E which says: "Nothing contained in this chapter shall apply to the location and site of the Nassau County Veterans Memorial Coliseum or the conduct of any activity therein." In other words any events held at the Coliseum are not subject to the ban on amusement rides.

The defendant here was duly issued a special event license as provided in Chapter 105, for the purpose of operating the Long Island Cerebral Palsy Fair. In that connection it operated certain amusement rides at the fair grounds, which were on land partially owned and partially leased by Hofstra University.

The critical issue, as this Court sees it, is whether the defendant's constitutional rights were violated by the absolute prohibition of the operation of amusement rides as contained in Section 105-3, subd. D of the ordinance.

It is this Court's duty to determine the constitutionality of subd. D, inasmuch as the validity of the legislative act is properly challenged here. This Court must set aside any statute which clearly transcends the provisions of the

United States Constitution. See N.Y. Jur., Constitutional Law Section 43.

This Court is constrained to hold that the defendant's constitutional right to run a legitimate business enterprise is violated by that section.

It is fundamental that the right to engage in a lawful business is within the protection of the due process guarantee. Therefore, a statute which results in depriving the owner of a lawful business from pursuing the same, is basically invalid. See 9 N.Y. Jur., Constitutional Law Section 359; *Defiance Milk Produces Co.* v. *DuMond*, 309 N.Y. 537; *Elite Dairy Products* v. *Ten Eyck*, 247 AD 443, modified 271 N.Y. 488; *Hecht* v. *Monaghan*, 307 N.Y. 461.

The test as set down in *Defiance*, supra., is whether the legislative remedy was unreasonable and confiscatory. This Court is of the opinion that the portion of the ordinance which arbitrarily prohibits amusement rides is confiscatory and unreasonable.

The Court is well aware of the People's argument that the justification for this provision lies in the exercise of the Town's police power for the protection of the public.

However, the Court is unconvinced that in this case this absolute prohibition is a proper use of police power. The Court recognizes a Town's right to provide for licensing, tests, etc. of any equipment used by the public. There is no doubt in this Court's mind that if the ordinance made it mandatory to have the equipment inspected, even though it basically meets State specifications, that, too, could be tolerated. But, to completely bar somebody engaged in this business from doing so in the Town of Hempstead is not reasonable nor justifiable. See *People* v. *Scott*, 26 N.Y. 2d 286, pages 291 and 292.

The Court is puzzled by another provision of the ordinance in question. Why, if the ordinance is meant to protect

the public, does it exempt protection of the public and permit the use of amusement rides at the location of the Nassau County Veterans Memorial Coliseum by exempting that area from coverage by this ordinance? Certainly, by dint of numbers alone, the people who would visit the Coliseum would be many times those who visit a local church bazaar or palsy fair. It seems incongruous that the public should be protected outside of the Coliseum area but not within the Coliseum area, if that is the rationale behind the ordinance.

The rationale followed by Chief Judge Lehman in *Good Humor* v. *City of New York* reported at 290 N.Y. 312 is certainly in point here. The Court there was passing on a New York City local law which made it unlawful for any person to sell goods, wares or merchandise on any of the streets of the City, but, did not make the provisions of the section applicable to persons operating push cart or other vehicle in an open-air market licensed by the Department of Markets, or operated by any verteran, blind person or other individuals. As the Court stated, the local law had no reasonable relation to the public health and was not intended to protect articles of food from contamination. It had no reasonable relationship to peddling on the streets without a license. Similarly, in the case before us, a license can be obtained to run a bazaar, fair or the like but rides could not be operated even though they might meet with all safety tests and precautions.

As Judge Lehman so wisely put it in *Good Humor,* supra., "Contumacious disregard of the law and abuse of legal rights by some will justify curtailment of the legal rights of those who do not abuse them only where there is reasonable ground for a legislative finding that discrimination between the useful and the harmful is impractical." No such justification is present here.

It is the duty of the Court to scrutinize closely any curtailment of freedom in the framework of the relation-

ship between the individual and society. While the Court does not question the motives of the Town, subd. D is palpably too broad and general and amounts to confiscation, which this Court can not condone. See *Grosman* v. *Baumgartener,* 40 Misc. 2d 221.

Accordingly, this Court finds Section 105-3, subdivision D unconstitutional, but the balance of the ordinance lawful. In view of this finding, the other technical objections urged by the defendant are academic.

/s/ I. Stanley Rosenthal
District Court Judge

Dated:

July 11th, 1975

cc: W. Kenneth Chave, Jr., Esq.
Leopold Kaplan, Esq.

ISR:mt

APPENDIX I

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Law No. 58,229

DELL AND TRAVERS SHOWS, INC., *Plaintiff,*

v.

PRINCE GEORGE'S COUNTY, MARYLAND, *Defendant.*

Order

THIS CAUSE came on to be heard on the Bill of Complaint filed by the plaintiff seeking declaratory relief under the Uniform Declaratory Judgments Act, Maryland Code Annotated, Article 31A, and on the answer filed by the defendant and on certain interrogatories propounded by the parties to each other and on certain stipulations which the parties have agreed to by their respective counsel, as indicated by the recitations of this Order, endorsed by counsel for both parties, and

IT APPEARING to the Court that the plaintiff, Dell and Travers Shows, Inc., as aforesaid, has prayed for certain declaratory relief as set forth in the Bill of Complaint, including a construction of certain ordinances of Prince George's County, Maryland, the defendant herein; namely, Bills numbered CB-60-1972 and CB-93-1973, and

IT APPEARING that Dell and Travers Shows, Inc. is a party which engages in the operation of carnival amusements, and that it is a foreign corporation which is duly qualified to transact business in the State of Maryland, and it has standing to raise the questions that are raised in the Bill of Complaint herein, and

IT APPEARING that under the ordinances which are the subject of this litigation, the defendant, Prince George's County, Maryland, may have purported to impose some

restraint or limitation upon the owners or operators of carnivals conducting business within Prince George's County by way of providing as a condition for obtaining the necessary use or occupancy permit in order to comply with the requirements of the said County's zoning ordinances prior to operating, that the application therefor be submitted by a sponsoring "eligible organization", and

IT APPEARING that these ordinances may have been construed by the administrative officers charged with the administration of the ordinances of Prince George's County, Maryland as requiring all carnivals or carnival operators, prior to obtaining a permit to operate, to obtain such sponsorship of their otherwise lawful business activities; namely, the operation of amusement rides, shows, and games of fun and skill (other than such games which may be prohibited under the gaming laws of the State of Maryland), and

IT APPEARING THEREFORE that it may have been administrative practice to require applications for use and occupancy permits under the zoning ordinances of Prince George's County, Maryland, for carnival operations, which as lawful businesses are permitted to operate in the appropriate commercial zones, to be submitted by a sponsoring organization, of the type defined by Sec. 50-4(e) of the said Bill numbered CB-60-1972, and

IT APPEARING that the defendant, County of Prince George's, Maryland, recognizes the right of a lawful business enterprise to operate its lawful business without unreasonable restraint or regulation, and

IT APPEARING that a carnival operation consisting of amusement rides and devices, shows, concessions, games of fun and skill (except with respect to certain games which are in violation of the gaming laws of the State of Maryland, such as paddle wheels, wheels of fortune, bingo, or similar games) is a lawful business enterprise, and

IT APPEARING that the County of Prince George's, Maryland in recognizing the right of a lawful business enterprise to operate within the County, did not intend to impose by its ordinances any sponsorship requirement by a designated "eligible organization" respecting the operation of its lawful business, and any construction of said Bill numbered CB-60-1972 which would require sponsor ship of a carnival (or the operator thereof) by any such organization as a condition for obtaining a use permit in a proper commercial zone in order to conduct its lawful business activities is invalid and of no force and effect, and

IT FURTHER APPEARING that a voluntary agreement to associate in the conduct of a carnival between an owner of a carnival and any such sponsoring organization, insofar as the same may pertain to the lawful activities thereof, that is to say, with respect to all aspects of the operation thereof except such games that may be prohibited under the gaming laws of the State of Maryland, should be done within the discretion of the contracting parties, and should not be subject to any requirements of these said ordinances, or any similar ordinances, and

IT APPEARING that the amendment to Sec. 50-4 of the Code of Public Laws by enactment of Bill numbered CB-60-1972 was intended to or should have intended to provide only for a means of permitting activities to be operated as a benefit performance which would otherwise violate the gaming laws of the State of Maryland, and was not or should not have been designed to restrict or pertain to the operation of a lawful business enterprise, particularly including a carnival consisting of amusement rides, shows, concessions, and games which are not prohibited by the State of Maryland gaming laws, and

IT APPEARING that any requirements of sponsorship by an "eligible organization", and any requirement that only members of such eligible organization manage and operate

the benefit performance should be limited and confined to only such games which would otherwise be prohibited under the State of Maryland gaming laws, and

IT APPEARING that the plaintiff has dismissed without prejudice so much of the Bill of Complaint that seeks relief from the provisions of Bill numbered CB-93-1973 concerning the levy of admissions taxes,

It is therefore ORDERED, ADJUDGED and DECREED that any construction, interpretation, administration or application of said ordinances of Prince George's County, Maryland, being Bill numbered CB-60-1972, Section 50-4 of the Code of Public Laws prior to amendment, or similar ordinances, which would require a carnival (or the owner or operator thereof) consisting of amusement rides, shows, concessions and games (to the extent that such games are not in violation of statutes of the State of Maryland prohibiting gaming activity) to obtain sponsorship by an "eligible organization" as defined under the provisions of that said ordinance or similar ordinances, is and shall be invalid and of no force and effect, and

It is further ORDERED, ADJUDGED and DECREED that a voluntary agreement between the owner or operator of a carnival as hereinabove defined and any sponsoring organization, except to the extent that such agreement pertains to the operation of those particular games which would be in violation of the statutes of the State of Maryland under its gaming laws, shall be subject to no special requirements of the ordinances set forth herein or of similar ordinances, other than the requirements which generally pertain to the reasonable regulation of lawful businesses which would pertain in the absence of such voluntary agreements between a carnival owner or operator and a sponsoring organization, and

It is further ORDERED, ADJUDGED and DECREED that any requirement of sponsorship by an "eligible organization"

as defined in Sec. 50-4 of the Code of Public Laws of Prince George's County, Maryland, as amended, particularly by Bill numbered CB-60-1972, and any requirement that only members of such eligible sponsoring organization manage and operate the benefit performance shall be specifically limited and confined only to the operation of such games which would otherwise be prohibited under the State of Maryland gaming laws, and such requirement imposed by any ordinance of Prince George's County, Maryland shall not pertain to the other activities of a carnival operating within the said County of Prince George's which are not prohibited by the gaming laws of the State of Maryland, and

It is further ORDERED, ADJUDGED and DECREED that there is nothing further to be done in this case inasmuch as the plaintiff has dismissed without prejudice that portion of the Bill of Complaint seeking relief from the provisions of the ordinances of Prince George's County, Maryland pertaining to the levy of admissions taxes.

AND THIS ORDER IS FINAL.

ENTERED this 18th day of July, 1975.

/s/ RALPH W. POWERS
Judge

Seen and Agreed:

B. G. STEPHENSON, LTD.

By: /s/ B. G. STEPHENSON
B. G. Stephenson
Of Counsel for Plaintiff
2001 Jefferson Davis Highway # 603
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(703) 521-1830

BELL, SHAPIRO, WEIL & JACOBS

By: /s/ HW

Henry E. Weil
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7735 Old Georgetown Road
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(301) 656-0700

/s/ JOSEPH S. CASULA
Joseph S. Casula, County Attorney and
Attorneys for Defendant
Courthouse
Upper Marlboro, Maryland 20870
(301) 627-3000, Ext. 224

/s/ HARRY L. DURITY
Harry L. Durity,
Deputy County Attorney

(Seal)

True Copy—Test:—

CHARLES E. CALLOW
Clerk # 2

Supreme Court, U. S.
FILED
AUG 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-140

REITHOFFER'S, INC., *Appellant*

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Appellee*

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

FREDERIC LEE RUCK
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Counsel for Appellee

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1975

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BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
Appellee

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellee Board of Supervisors of Fairfax County, Virginia, moves that the above-captioned appeal from the Supreme Court of Virginia be dismissed.

OPINIONS BELOW

The opinion of the Circuit Court of Fairfax County, Virginia, as rendered at the hearing of this cause, is unrecorded but is reprinted from the transcript of the

trial court's proceedings as Appendix C to Appellant's Jurisdictional Statement. The final order of the Circuit Court is reprinted as Appendix D to Appellant's Jurisdictional Statement. The Supreme Court of Virginia's rejection of Appeal and denial of Petition for Rehearing are reprinted as Appendix E and Appendix F to Appellant's Jurisdictional Statement.

JURISDICTION

Appellee Board of Supervisors of Fairfax County, Virginia, concurs in the statement of jurisdiction as set forth by Appellant (App. Br., pp. 2-3), but states that no substantial federal questions are presented by the Appeal.

STATEMENT OF THE CASE

On February 19, 1974, Appellant, Reithoffer's, Inc., filed a bill of complaint in the Circuit Court of Fairfax County challenging the constitutionality of § 30-7.2.6.1.4 Fairfax County Zoning Ordinance (1961), as amended, dealing with the operation of carnivals, circuses, fairs, horse shows, the sale of seasonal commodities, and other similar activities. An amended bill of complaint was subsequently filed on June 6, 1974, realleging the challenge contained in the original bill of complaint and also challenging the constitutionality of § 7-3 Fairfax County Code (1961), as amended, which imposes a County license tax on carnivals.

On July 25, 1974, after hearing *ore tenus* before the Circuit Court of Fairfax County, Virginia, the Honorable Barnard F. Jennings rendered his oral opinion that § 7-3 is a legal, constitutional and valid ordinance and that § 30-7.2.6.1.4 is a legal, constitutional and proper exercise of the police power, except insofar as it required that members of local organizations sponsoring carnivals must collect money and handle ticket sales at carnival concessions, shows, and games. This ruling was carried forward in a final decree entered on October 9, 1974, from which Appellant, Reithoffer's, Inc., appealed to the Supreme Court of Virginia. On February 26, 1975, Appellant's petition for appeal was rejected, and its petition for rehearing was likewise denied on April 28, 1975. Appellant's notice of appeal to the United States Supreme Court was filed on July 23, 1975, and its Jurisdictional Statement was filed with the Clerk of the Supreme Court on July 25, 1975.

Appellee Board of Supervisors of Fairfax County, Virginia, agrees with the statement of the text of the two challenged ordinances reprinted as Appendix A and Appendix B of Appellant's Jurisdictional Statement.

Two witnesses were presented at trial by Appellant. The first witness, Mr. Knowlton, Fairfax County Zoning Administrator, stated that carnivals may operate in Fairfax County as a use of right in the I-G (Industrial General) and I-L (Industrial Limited) zoning categories without the requirement of sponsorship by a local civic association, and that they may operate with such sponsorship as a special use in most of the residential and commercial zones of the County. (R., 18). He further testified that there are sites zoned to the I-G and I-L categories which have adequate area, access, parking facilities, and topography to permit the operation of carnivals (R., 40-45).

Appellant's other witness, Mr. Reithoffer, testified about the operation of his carnival business. He stated that his carnival operation travelled from place to place, operating in any one location for periods of one

week to one month (R., 56). He testified that his show had not operated in Fairfax County in 1974, but had operated with sponsorship in the County in each of the preceding eight years (R., 70). It was stipulated by the parties that § 30-7.2.6.1.4 was in effect in each of the years when Reithoffer's carnival did business in the jurisdiction (R., 46). Mr. Reithoffer stated that sponsorship is often secured by his carnival even when not required by law, and that such sponsorship is helpful to his business (R., 71-73, 79, 84-85).

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

I. NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED.

A. Section 7-3, Fairfax County Code, Does Not Deny Appellant Due Process or Equal Protection in Contravention of Article XIV of the Constitution of the United States.

Appellant argues (App. Br., pp. 14-15) that § 7-3 is a regulatory enactment rather than a revenue measure. This contention is without support in the record below, and the trial court specifically ruled on the validity of the ordinance as a revenue producing tax.

An ordinance imposing a local license tax for the privilege of operating a business is presumed to be reasonable and valid. The burden of proving the invalidity of the ordinance lies with the complaining party. *Green* v. *Frazier,* 253 U.S. 233, 239, 64 L.Ed. 878, 881, 40 S.Ct. 499 (1920); *Langston* v. *City of Danville,* 189 Va. 603, 54 S.E.2d 101 (1949).

The ordinance challenged by Appellant recognizes two separate types of carnival activity for licensing purposes. Carnivals operated as fund-raising activities by local civic organizations under special use permit are taxed at a lower rate than carnivals operated

by amusement companies without local sponsorship in zoning categories where the carnival is permitted as a use of right. It is clear that general classes of business activities may be so subdivided into particular classes for the purposes of license taxation. *Southwestern Oil Co.* v. *Texas,* 217 U.S. 114, 126, 54 L.Ed. 688, 694, 30 S.Ct. 496 (1909); *McKenney* v. *City Council of Alexandria,* 147 Va. 157, 136 S.E. 588 (1927).

Courts accord a presumption of reasonableness to the classification of occupations contained in licensing statutes and ordinances. *Green* v. *Frazier, supra; Home Brewing Co.* v. *City of Richmond,* 181 Va. 793, 27 S.E.2d 188 (1943). The judgment of the governing body imposing the license should, moreover, be given great weight so that an ordinance will not be struck down if any state of facts can reasonably be conceived to sustain it. *Rast* v. *Van Deman & Lewis Co.,* 240 U.S. 342, 357, 60 L.Ed. 679, 687, 36 S.Ct. 370 (1915); *Quong Wing* v. *Kirkendall,* 223 U.S. 59, 56 L.Ed. 350, 32 S.Ct. 192 (1912); *Manhattan Company* v. *County Board of Arlington County,* 197 Va. 765, 91 S.E.2d 408 (1956).

The evidence at trial showed that the general class of carnival businesses had been subdivided into two separate and distinct sub-classes for licensing purposes. One sub-class is comprised of carnivals operated as uses of right in the I-G and I-L zoning districts of Fairfax County. These carnivals are run by amusement companies for profit. They are not sponsored by local civic organizations and may operate in a community for periods varying from one week to one month (R., 56). The other sub-class is comprised of carnivals sponsored by local charitable organizations as fund-raising activities under special use permit, as provided

by the local zoning ordinance. Such special use operations must conform to the requirements for local participation in carnival operation set forth by § 30-7.2.6.1.4 Fairfax County Code (App. Br., Appendix A). Responsibility for the operation of the carnival, therefore, lies not only with its owner, but with its local sponsor as well. The sponsor has permanent ties to the local community and its members may assist in, and share responsibility for, staffing the carnival shows, as well as advertisement, and sales of tickets in the community (R., 72-73, 79). Thus, the means and method by which a carnival is conducted differs for the two sub-classes of business created by the challenged license tax.

It is proper for a legislative body to make the differences in method and character of businesses the basis of classification for taxation. *Louis K. Liggett Co.* v. *Lee,* 288 U.S. 517, 532, 77 L.Ed. 929, 936, 53 S.Ct. 481 (1932); *H. L. Carpel of Richmond, Inc.* v. *City of Richmond,* 162 Va. 833, 175 S.E. 316 (1934). This Court has, for example, affirmed the constitutionality of a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which exempted planters and farmers grinding and refining their own sugar and molasses. *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 45 L.Ed. 102, 21 S.Ct. 43 (1900). In *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245, 67 L.Ed. 237, 43 S.Ct. 83 (1922) it was held that Pennsylvania might impose a license tax on the mining of anthracite coal, while none was put on bituminous coal. *See Singer Sewing Machine Co.* v. *Brickell,* 233 U.S. 304, 58 L.Ed. 974, 34 S.Ct. 493 (1914); *Armour Packing Co.* v. *Lacy,* 200 U.S. 226, 50 L.Ed. 451, 26 S.Ct. 232 (1906); *W. W. Cargill Co.*

v. *Minnesota,* 180 U.S. 452, 45 L.Ed. 619, 21 S.Ct. 423 (1901).

In order for Appellant to successfully challenge the constitutionality of the carnival licensing ordinance, it must prove that its carnival is precisely the same as those included in the class of carnivals alleged to be favored. *Bradley & Co.* v. *City of Richmond,* 110 Va. 521, 526, 66 S.E. 872, 874, *aff'd* 227 U.S. 477, 57 L.Ed. 603, 33 S.Ct. 318 (1913). This burden was not met by Appellant at trial. The evidence, in fact, clearly shows the difference in method of operation and character of the two classes of carnival business licensed by Fairfax County. This Court should not inquire into the wisdom or propriety of the classification made by Appellee, Board of Supervisors of Fairfax County, in enacting the carnival license tax. It need only determine whether the record shows a reasonable basis for distinction between the classes of carnival activity established by the ordinance. *State Board of Tax Commissioners* v. *Jackson,* 283 U.S. 527, 75 L.Ed. 1248, 73 A.L.R. 1464 (1931).

> It is not the function of this court . . . to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. *Such differences need not be great.* (Emphasis added).

Id. at 537-538 and 1256.

There is no suggestion in Appellant's Jurisdictional Statement, nor was evidence produced at trial, to prove a lack of uniformity in treatment within each of the sub-classes of carnival business established by the challenged license tax. Likewise, Appellant's evidence and

arguments do not establish that the amount of license tax levied against either sub-class of carnival was great enough to prohibit the pursuit of this occupation or to be confiscatory in its application to either sub-class.

B. Section 30-7.2.6.1.4 Fairfax County Zoning Ordinance Does Not Deny Appellant Due Process or Equal Protection in Contravention of Article XIV of the Constitution of the United States.

It is well settled that reasonable zoning ordinances are constitutional and a valid exercise of the police power of the states. *Nectow* v. *Cambridge,* 277 U.S. 183, 72 L.Ed. 842, 48 S.Ct. 447 (1928); *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct 114 (1926).

Particular zoning measures must, of course, observe constitutional guarantees of personal and property rights. Zoning legislation is not void, however, unless it is unreasonable and arbitrary, in excess of municipal power, or an abuse of legislative or administrative discretion. *Nectow, supra; Euclid, supra; Zahn* v. *Board of Public Works of Los Angeles,* 274 U.S. 325, 71 L.Ed. 1074, 47 S.Ct. 594 (1927).

Moreover, zoning ordinances are presumptively reasonable, valid, and constitutional and the burden of proof is on the party challenging the ordinance to clearly show the contrary. *Zahn, supra* at 328 and 1076; *Board of County Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959). This is particularly true since zoning is governmental and legislative in character and constitutes an exercise of the police power to promote the general welfare. *Euclid, supra; State of Washington* v. *Roberge,* 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928); *Blankenship* v. *City of Richmond,* 188 Va. 97, 49 S.E.2d 321 (1948).

Appellee, Board of Supervisors of Fairfax County, has made a legislative determination that carnivals, circuses, fairs, horse shows, the sale of seasonal commodities, and other similar activities are appropriate uses of right on land zoned to the I-G and I-L categories. In these two categories a carnival may be conducted without the requirement of sponsorship by a local civic organization or any of the other conditions for operation of carnivals as special uses set forth in § 30-7.2.6.1.4 of the Fairfax County Zoning Ordinance. Appellee's judgment concerning the zoning categories in which carnivals are permitted as uses of right should be upheld by this Court unless it appears that the restriction of carnivals to these categories is clearly arbitrary and unreasonable. *West Brothers Brick, Inc.* v. *Alexandria,* 169 Va. 271, 192 S.E. 881 (1937), *app. dis.* 302 U.S. 658, 82 L.Ed. 508, 58 S.Ct. 369 (1938).

Section 30-7.2.6.1.4 of the Fairfax County Zoning Ordinance allows the operation of carnivals and other similar activities under special use permit where they are not allowed as uses of right. Appellee, Board of Supervisors of Fairfax County, is specifically authorized by state law to make such special exceptions from the general provisions of its local zoning ordinance under suitable regulations and safeguards. Section 15.1-491(c) *Va. Code Ann.* (1950), as amended.[1]

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[1] § 15.1-491. *Permitted provisions in ordinances; amendments.* A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

• • •

(c) For the granting of special exceptions under suitable regulations and safeguards; and notwithstanding any other provisions of this article, the governing body of any city, county or town may reserve unto itself the right to issue such special exception or use permit.

In general, statutes and ordinances which allow special uses or exceptions under reasonable conditions are, like other zoning laws, presumed valid and the burden is on the party challenging the ordinance to prove its invalidity. 8 McQuillin, *Municipal Corporations* § 25-161; *Zahn, supra; Board of County Supervisors* v. *Carper, supra.* This inclusion of special use provisions in comprehensive zoning ordinances

> . . . permits the inclusion into the zoning pattern (either in all zones or in certain particular zones) of uses considered by the legislative body to be essentially desirable (or essential) to the community, its citizenry or to substantial segments thereof, but where the nature of the use or its concomitants (traffic congestion, density of persons, noise, effect on values, safety or health) militate against its location at every location therein or in any location without restrictions or conditions tailored to fit the special problems which the use presents.

2 Rathkopf, *The Law of Zoning and Planning* § 54-1.

Appellee, Board of Supervisors of Fairfax County, has determined that carnivals operated as fund-raising activities by local civic and charitable organizations may exist as special uses where not allowed as uses of right. Such special uses are permitted, however, only where they comply with the special requirements for carnival operation set out in § 30-7.2.6.1.4 of the Fairfax County Zoning Ordinance. These requirements produce a high degree of local control over, and responsibility for, the carnival operation. They constitute the "suitable regulations and safeguards" for the surrounding community demanded by § 15.1-491(c) of the Code of Virginia, *supra,* if special use permits are to be granted. The ordinance should not be set aside by this Court, since Appellant Reithoffer's, Inc., has failed to

show that it is clearly unreasonable and arbitrary. *Euclid, supra; Zahn, supra; West Brothers Brick Co., supra; Board of County Supervisors* v. *Carper, supra.*

C. The Challenged Ordinances Are Not a Burden on Interstate Commerce in Contravention of Article I, Section 8 of the Constitution of the United States.

The contention (App. Br., pp. 12-14), that Section 30-7.2.6.1.4 Fairfax County Zoning Ordinance (App. Br., Appendix A), places an unconstitutional burden on interstate commerce is unsupported by law and the facts of the case.

Section 30-7.2.6.1.4 applies to Appellant Reithoffer's, Inc., only by virtue of that Company's intrastate business, carried on entirely within Fairfax County, Virginia. It is well settled that state or local police regulations will be sustained where they impose no direct burden on, or only incidentally affect interstate commerce. *Asbell* v. *State*, 209 U.S. 251, 52 L.Ed. 778, 28 S.Ct. 485 (1908); *Field* v. *Barber Asphalt Paving Co.*, 194 U.S. 618, 48 L.Ed. 1142, 24 S.Ct. 132 (1903). The record below clearly demonstrates that, although Apellant takes its carnival show from state to state, it carries on its business on a local basis. Travel between the states is only incidental to the operation of carnival games, food stands, concessions and rides which take place entirely within the jurisdiction where the carnival is located.

Even assuming, however, that Appellant is transacting its carnival business in interstate commerce, the burden placed upon it by § 30-7.2.6.1.4 is, at most, an indirect and insubstantial one. Appellant's Jurisdictional Statement incorrectly asserts that § 30-7.2.6.1.4 compels all carnivals to secure sponsorship by local civic

associations as a prerequisite to doing business in Fairfax County (App. Br., p. 12). In fact, the ordinance only applies to locally sponsored carnivals operating under special use permit in certain zoning categories within the County. Amusement companies, such as Appellant Reithoffer's, Inc., may operate their businesses without local sponsorship in those zoning categories where carnivals are permitted as a use of right. Moreover, there is ample evidence in the record below to show the existence of sites in Fairfax County which are suitable for the operation of carnivals where no local sponsorship is required (R., 40-45). There is no constitutional prohibition against a local ordinance which, like § 30-7.2.6.1.4, does not directly interfere with or unduly burden interstate commerce. *Nippert* v. *City of Richmond,* 327 U.S. 416, 90 L.Ed. 760, 66 S.Ct. 586 (1945).

States and their political subdivisions may make valid enactments, in the exercise of their legislative power, to promote the welfare of their citizens, even though in their operation they may have an effect on interstate commerce. *Pennsylvania Railroad Co.* v. *Hughes,* 191 U.S. 477, 48 L.Ed. 268, 24 S.Ct. 132 (1903); *Atlantic Coast Line Co.* v. *Commonwealth,* 102 Va. 599, 46 S.E. 911 (1904). Here, Appellee, Board of Supervisors of Fairfax County, has enacted an ordinance which, along with the other provisions of its comprehensive zoning legislation, limits and conditions the operation of carnivals and other similar activities in the County. These ordinances are properly enacted to promote the reasonable use of land and protect the citizens of Fairfax County in the enjoyment of their property. *Nectow, supra; Village of Euclid, supra.*

Appellant has failed to demonstrate that the burden upon interstate commerce imposed by § 30-7.2.6.1.4., if any, is direct or substantial. Moreover, there is a clear public benefit accruing from the ordinance as a part of a rational comprehensive zoning scheme designed for the benefit of the citizens of Fairfax County.

CONCLUSION

For the foregoing reasons, Appellee Board of Supervisors of Fairfax County, Virginia, moves that the Appeal of Reithoffer's, Inc., be dismissed.

Respectfully submitted:

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